No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

Larry A. Tawwater
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street N.W.
Suite 200
Washington, DC 20001
(202) 965-3500

President, American Association for Justice

Jeffrey R. White
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street N.W.
Suite 520
Washington, DC 20001
(202) 944-2839
jeffrey.white@cclfirm.com

Attorney for Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent the injured victims of misconduct. American Association for Justice members often represent personal injury plaintiffs as well as those whose civil rights and consumer rights have been violated. Often, the compensation sought by many plaintiffs with similar claims may not justify the expense and use of judicial resources in litigating individual cases. AAJ members have made use of class actions under Federal Rule of Civil Procedure 23 as an efficient means for achieving justice in those circumstances.

This is such a case, and AAJ believes that the court below decided it correctly. AAJ is concerned that Petitioner's contention that a class may not be certified if some absent members were not injured places a heavy and unnecessary burden on class action plaintiffs that is inconsistent with the aims of Rule 23.[1]

SUMMARY OF THE ARGUMENT

1. The Second Question, whether a class action may be certified when absent members of the

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[1] Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Supreme Court Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

class were not injured and not entitled to any damages, is not properly presented. The court below did not address the issue, but its ruling is consistent with the prevailing rule in federal courts that Article III does not require plaintiffs to prove that every absent class member was injured in fact.

In this case, however, the Complaint alleged that all members of the class did in fact suffer injury. Plaintiffs alleged that all class members were hourly employees paid under Tyson's "gang-time system," which undercompensated them for donning and doffing personal protective equipment and other activities. Those allegations that all members of the class suffered financial harm due were sufficient for Article III standing, despite the fact that plaintiffs at trial only sought recovery of uncompensated overtime.

Article III standing does not require plaintiffs to prove the merits of their claims at the outset of the litigation. Allegations suffice. If plaintiffs fail to prove at trial that they are entitled to compensation, action does not cease to be a "case or controversy." Indeed, the alleged harm or injury for standing purposes need not state a cause of action under federal or state law or support a compensable claim for damages.

Because all members of the class could allege injury in fact, this case does not properly present the question whether a class with members lacking Article III standing may be certified. This Court has declined to decide questions of constitutional law unnecessarily or to formulate rules of constitutional law more broadly than required by the precise facts of the case before the Court. The Court should accordingly dismiss the writ as improvidently granted with regard to the second question presented.

2. The Court should also decline to address the second question presented because Petitioner lacks standing to challenge certification on the ground that uninjured class members increased the size of, or will share in, the jury's damage award.

Plaintiffs did not ask the jury to award all the unpaid wages described in their Complaint. They limited their claim to the amount of overtime that Tyson failed to pay to the class as a result of its gang-time system. Plaintiffs' expert testified that she had identified 212 workers who would not have been eligible for overtime because they would not have worked over 40 hours per week, even if credited with time donning and doffing protective equipment. She further testified that she had excluded those workers from her calculation of the total uncompensated overtime. Indeed, she testified that, under instructions from plaintiffs' counsel, she had excluded all individual claims under $50.

It is clear from the record, then, that the claims of all workers who suffered no loss of overtime were excluded from the calculation of damages sought from the jury. Excluding those persons from the certified class would not have affected in any way the size of the damage award. Petitioner lacks standing to challenge the certification of the class on that basis.

Nor does Petitioner have standing to challenge the eventual allocation of the aggregate damage award among the members of the class. By seeking an aggregate verdict, Petitioner waived any defenses to individual claims or the right to have the jury determine individual damages. The allocation of the award will have no effect on Petitioner's liability.

This Court should therefore decline to reach the second question and dismiss the writ as improvidently granted as to that question.

3. If this Court addresses the second question presented, the Court should affirm. The decision below conforms to the position of every federal circuit to consider the question: Where the named class representative has standing, Article III does not require that plaintiffs also prove that every absent class member has suffered injury in fact. Rather, federal courts ensure that class actions present a justiciable case or controversy by careful application of the Rule 23 prerequisites for class actions. Class certification issues are logically antecedent to Article III issues and make additional proof of standing unnecessary. None of the decisions cited by Petitioner require proof of standing of absent class members as a condition of certification.

This position also comports with this Court's precedents in a variety of circumstances involving representative actions. In class actions, for example, this Court has focused on the standing of the named plaintiffs. Similarly in cases involving multiple plaintiffs, this Court has held that Article III standing of at least one named plaintiff is sufficient.

Careful application of the Rule 23 prerequisites for class certification provides a fairer and more practical guarantee of justiciability than requiring that plaintiffs prove injury in fact of each absent class member. Requiring plaintiffs to prove the merits of their claims at the outset of the litigation is impractical and undermines the economies of the class action device. Nor does such a requirement offer any legitimate benefits. Plaintiffs who succeed in

proving the merits of their claims will have little incentive to settle for less than their full demand, increased by the added costs of proof. Plaintiffs who do not succeed may bring wasteful repetitive individual actions. But plaintiffs with modest claims will more likely abandon their legitimate claims altogether. Evasion of accountability by unnecessarily increasing the cost of obtaining justice is not a legitimate goal.

All the tools necessary for ensuring that class actions present a justiciable case or controversy are already in the hands of the district courts through careful application of Rule 23. One such tool is the authority to tailor the class definition to ensure that common issues of law or fact predominate and class representatives adequately represent the class. If the class appears to include persons who were not injured, the district court can require that the class definition be revised and narrowed. In appropriate circumstances, a court may create subclasses or ask the factfinder to return a class-wide recovery that can later be allocated in a fair and practical way. Or a court might try only liability issues in common, leaving individualized damage assessments for a later stage. Rule 23 also allows the court to revisit and revise its decision in light of new developments or evidence.

Petitioner's proposal provides none of these benefits, undermines the efficient resolution of class actions, and will burden access to the federal courts for many with legitimate, though modest claims.

ARGUMENT

I. The Article III Standing of Absent Class Members Is Not at Issue Where Plaintiffs Alleged Injury to All Members of the Class.

AAJ respectfully addresses this Court with respect to the Second Question Presented: Whether a class action may be certified "when the class contains hundreds of members who were not injured and have no legal right to any damages."

The court below did not address this issue directly, pointing out that "at Tyson's request, the jury was instructed, 'Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages.'" *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 798 (8th Cir. 2014).[2] However, the court's affirmance conforms to the prevailing rule in federal courts that "[a] class action can be maintained by one class representative with proper standing," 2 William B. Rubenstein, Albert Conte, & Herbert B. Newberg, *Newberg on Class Actions* § 2:8 (5th ed. 2011), and that Article III does not require a showing that each absent class member also has standing. *Id.* at § 2:1. *See also* 5 J. Moore *et al.*, *Moore's Federal Practice* § 26.63[1][b], at 23-304 (3d. ed. 2014) ("[A]t least one named class representative must have Article III standing to raise each [class] claim.").

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[2] This Court "ordinarily do[es] not decide in the first instance issues not decided below" where the Court is "without the benefit of thorough lower court opinions to guide our analysis of the merits." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012).

Tyson petitioned this Court for a Writ of Certiorari, arguing in part that the district court violated Article III and exceeded the limits of federal court jurisdiction by certifying a class that included a significant number of members who had suffered no injury in fact and thus had no standing to bring this action. Pet. 25 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Petitioner further contended that the circuits are deeply divided on whether such a class may be certified. *Id.* 26-29 & n.6. This Court granted the petition, including its second question presented. *Tyson Foods, Inc. v. Bouaphakeo*, 135 S. Ct. 2806 (2015).

AAJ suggests that this question is not properly presented in this case. Plaintiffs alleged that all members of the class were injured because they were not fully compensated for work activities. To the extent that the standing of absent class members who were not injured is of substantial importance, the Court should await a case in which that question is properly presented.

A. Plaintiffs' complaint alleged that all members of the class were injured in fact.

Plaintiffs brought this action on behalf of hourly workers in two areas of Tyson's pork processing plant in Storm Lake, Iowa. Although the workers punch time clocks upon arrival and departure, they are not paid for all the time they are in the plant. Instead, as Petitioner states, "Tyson's 'gang-time' system compensates them from the time the first piece of product passes their work stations until the last piece of product passes." Br. of Petitioner 5-6. In addition, Tyson paid workers four

minutes per day of "K-Code time" during 2004 to 2007 as compensation "for donning/doffing-related activities." From 2007 to 2010, Tyson paid four to eight minutes per day for K-Code time, limited to knife-wielding employees. *Id.*

Plaintiffs contended that this "gang-time system" failed to fully compensate them for their work and brought this action for "unpaid wages and unpaid overtime wages" and other relief under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* and under Iowa law. Original Class Action and Representative Action Complaint ("Compl.") ¶¶ 1 & 2, J.A. 28. Specifically, Plaintiffs alleged:

> Tyson has failed to pay Plaintiffs their minimum hourly rate of pay for all hours of work they performed *in addition to* overtime as required by federal law. The uncompensated time includes, but is not limited to, time spent preparing, donning, doffing, obtaining and sanitizing sanitary and safety equipment and clothing, obtaining tools, equipment and supplies necessary for the performance of their work, "working" steels and all other activities in connection with these job functions, and walking between work sites after the first compensable work activity and before the last compensable work activity.

Id. at ¶ 4, J.A. 28-29 (emphasis added). *See also id.* at ¶¶ 34-39, J.A. 37-38 (detailing the activities which plaintiffs alleged to be uncompensated work). Plaintiffs further alleged, "Defendant Tyson has

intentionally refused to pay all wages due as set forth in the preceding paragraphs of this Complaint to Plaintiffs and class members." *Id.* at ¶ 51, J.A. 41.

The injury described in the Complaint was not limited to unpaid overtime compensation. All members of the class were paid under the gang-time system. If the specified activities are found to be "work" under the FLSA, as alleged, then all members of the class were deprived of "their minimum hourly rate of pay for all hours of work they performed in addition to overtime as required by federal law." *Id.* at ¶ 4, J.A. 28-29.[3]

B. Injury-in-fact does not require proof of compensable claim at the outset of litigation.

Petitioner appears to concede that all class members may have been under-compensated, but insists that "evidence at trial showed that some class members did not work overtime and would receive no FLSA damages *even if Tyson under-compensated their donning, doffing, and walking.*" Pet. 13 & Br. of Petitioner 15 (emphasis added). On that basis, Petitioner contends that certification was improper because some members lacked any injury, as required by Article III. Pet. 30; Br. of Petitioner 44-45.

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[3] *See Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-CV-04009-JAJ, 2011 WL 3793962, at *3 (N.D. Iowa Aug. 25, 2011) ("If it is determined that the donning and doffing and/or sanitizing of the PPE at issue constitutes "work" for which plaintiffs are entitled to compensation, then such a determination is applicable to all such situated plaintiffs.").

Petitioner's argument fails for two reasons. First, Article III does not demand that a plaintiff win his case on the merits at the certification stage. Allegations that each member of the class was affected financially by Defendant's conduct, as Plaintiffs alleged here, suffice. *See, e.g., Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) ("[A]llegations of lost sales and damage to its business reputation give [plaintiff] standing under Article III."); *In re Deepwater Horizon*, 739 F.3d 790, 802 (5th Cir. 2014)), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014) ("Article III does not require a showing that an absent class member can prove his case at the Rule 23 stage, so long as the absent class member can allege standing.") (internal quotations omitted); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012) ("To the extent that class members were relieved of their money by Honda's deceptive conduct—as Plaintiffs allege—they have suffered an 'injury in fact.'").

The fact that plaintiffs might not succeed in proving by the evidence that they are entitled to compensation for their concrete injury—or even that they have stated a valid cause of action—does not deprive them of standing or the federal court of subject matter jurisdiction. That analysis "goes to the merits and not to statutory standing." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998).[4]

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[4] This Court has indicated that in limited circumstances, it may be necessary for a court "to probe behind the pleadings" and inquire into the merits of the allegations "before coming to rest on the certification" question. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). However, that inquiry is limited "to determining

Thus, "[j]urisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Id.* at 89 (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). As Judge Posner has observed, "when a plaintiff loses a case because he cannot prove injury the suit is not dismissed for lack of jurisdiction [I]nstead the suit is dismissed on the merits." *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009).

Indeed, the injury alleged need not constitute a compensable claim. This Court, for example, has repeatedly held that invasion of an individual's noneconomic aesthetic or recreational interests may result in an injury for Article III standing purposes, regardless of whether the injury would result in compensable damages. *See, e.g, Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000) (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Lujan*, 504 U.S. at 562-63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a

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whether the Rule 23 prerequisites for class certification are satisfied." and "grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013). The determination of Article III standing "in no way depends on the merits" of the plaintiffs' claims. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997) (Standing "goes to the Article III jurisdiction of this Court and the courts below, not to the merits of the case.").

cognizable interest for purposes of standing."); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (Article III injury in fact could be established by allegations that "aesthetic and recreational values of the area will be lessened by the [proposed] highway and ski resort"); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (Injury in fact "at times, may reflect aesthetic, conservational, and recreational as well as economic values.").

Similarly, exposure to toxic or harmful substances has been held sufficient to satisfy the Article III injury-in-fact requirement "even though exposure alone may not provide sufficient ground for a claim under state tort law." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006). *See also Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 574-75 (6th Cir. 2005) (the increased risk that a faulty medical device may malfunction constituted a sufficient injury-in-fact even though the class members' own devices had not malfunctioned and may have actually been beneficial).

Consequently, it is not uncommon for federal courts to determine that a plaintiff had alleged injury-in-fact supporting Article III standing, but had no compensable injury. *See, e.g., Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 637-40 (7th Cir. 2007) (Online bank customers whose personal information was hacked had standing to sue the bank for allegedly lax security measures, but failed to establish compensable injury); *Bediako v. Am. Honda Fin. Corp.*, 537 Fed. Appx. 183, 188 n.4 (4th Cir. 2013) (Plaintiff "has alleged an injury-in-fact sufficient to provide standing even if, as we have concluded, the claim fails on the merits.").

In this case, the allegations of the Complaint defined a class whose members were undercompensated due to Tyson's gang-time system. The fact that plaintiffs subsequently decided to seek only unpaid overtime or that the evidence showed some class members could not prove they were owed overtime did not affect their Article III standing. This case does not, therefore, properly present the question whether a class containing members lacking such standing may be certified.

This Court has developed "for its own governance in cases confessedly within its jurisdiction," two rules which it has adhered to regarding issues of constitutional law:

> [O]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885), *quoted in Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

AAJ suggests, therefore, that the writ be dismissed as improvidently granted with respect to the second question. *See, e.g., City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (dismissing writ as improvidently granted as to one of two questions); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 360 n.1 (2001) (similar).

II. Petitioner Lacks Standing to Challenge Class Certification on the Basis of the Aggregate Verdict in this Case.

A. Petitioner was protected from any possibility of paying compensation to class members who suffered no loss of overtime pay.

Plaintiffs did not ask the jury to award all the unpaid wages described in their Original Complaint. Instead, they limited their claim to the amount of overtime that Tyson failed to pay to the class as a result of its gang-time system. Briefly, Plaintiffs contended that if Tyson had properly credited them with the full time spent donning and doffing personal protective equipment and other activities, their total hours worked would have exceeded 40 hours per week. Under the FLSA, they were entitled to compensation for such time "at a rate not less than one and one-half times the regular rate." 29 U.S.C. § 207(a)(1).

At trial, Plaintiff's expert, Dr. Fox, calculated the average time spent performing uncompensated work activities, subtracted the K-code time received, and calculated the total uncompensated overtime owed to the class. Dr. Fox testified that the total amount owed to the Rule 23 class was $6,686,082.36. Br. of Petitioner 13.

Tyson has called the Court's attention to Dr. Fox's trial testimony that "the class included over 212 members who suffered no injury at all [because] even adding the estimated time did not result in those employees working over 40 hours in a single week." Pet. 11. Tyson argued unsuccessfully to the Eighth Circuit that decertification was necessary "because

evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson under-compensated their donning, doffing, and walking." *Id.* at 13. Tyson then sought this Court's review on the ground that the court below improperly certified the class to "compensate individuals who suffered no injury, lack Article III standing, and are entitled to zero damages." *Id.* at 30.

Having won review by this Court, Petitioner appears to deemphasize its Article III standing argument in favor of one of fairness:

> [T]he fact that a single, named class plaintiff has Article III standing—and that a court can therefore adjudicate a case or controversy between that plaintiff and the defendant—does not establish that the court has authority to award damages to class members who cannot prove injury.

Br. of Petitioner 46. Petitioner further complains that by certifying a class with uninjured employees, "the district court would force Tyson to pay employees whom it had fully compensated." *Id.* at 16. Moreover, "requiring defendants to pay damages to persons who cannot establish injury is not merely unfair and 'undesirable,' it is beyond the authority of federal courts." *Id.* at 47-48.

In contrast to the Petition's advocacy in favor of a rule that "no class may be certified that contains members lacking Article III standing," Pet. 28 (quoting *Denney*, 443 F.3d at 264), Petitioner now states:

> The fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured.

Br. of Petitioner 49.[5]

However, where Plaintiffs "cannot offer such proof," Petitioner proposes "they must demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment" so that they do not contribute to, or share in, the damage award. *Id.* Petitioner proposes that Rule 23 should require that class plaintiffs demonstrate a "fail-safe" and "administratively feasible and constitutionally valid way for culling the uninjured class members . *before* the class is certified." *Id.* at 49 & 50 (emphasis in original).

AAJ strenuously disagrees with imposing such a heavy and unfair burden on plaintiffs at the outset of a class action. However, the question is not properly presented in this case. The record clearly shows that Tyson was not at all affected by the presence of uninjured workers in the class or the absence of a "culling" mechanism. The evidence placed before the jury reflected only the claims of those workers who were owed overtime compensation. There was no possibility that Tyson would be forced to pay workers

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[5] That Petitioner has altered its position on the second question supports the dismissal of the writ as improvidently granted with respect to that question. *See Sheehan*, 135 S. Ct. at 1778-79 (Scalia, J., concurring in part).

it had already fully compensated. Tyson has no standing to challenge class certification or its affirmance on that ground.

Dr. Fox testified that, using Tyson's records, she had identified 212 workers who would not be entitled to overtime pay, even if credited with the additional time calculated by plaintiffs' expert Dr. Mericle. Although those workers remained in the class, Dr. Fox excluded them from her calculation of the total overtime owed to the class. Indeed, as Dr. Fox explained in her testimony, under instructions from counsel she excluded all those class members whose unpaid overtime was less than $50:

> Q. [by Mr. Mueller] And let me show you just one page of a many-page exhibit just so we are on the same page. This is page one for the FLSA class. It gives person by person and amount, correct?
>
> A. Correct.
>
> Q. And for example, the first person, Jose D. Acevedo, $220, then it goes on up, correct?
>
> A. Correct.
>
> Q. For that particular group did you limit them to persons that made—that their backpay was of a certain magnitude or amount?
>
> A. Yes, damages were only awarded if they would receive at least $50.

Q. At least $50. . . . So from this work you did you were able to determine for particular people what their loss was?

A. Yes.

* * *

Q. Now, taking the total amount, not the individual amounts, but the total amount, when you put all the individuals that are eligible together for the Iowa class, what backpay did you calculate?

A. Six point—$6,686,082.36.

Q. How many cents?

A. 36.

Q. All right. Let me show you the summary—what is the next number, 345—table. Are these the results of your calculation based on the method you told us about?

A. Yes.

Q. All right. And you—I notice that you said number in the Iowa class is 2,850. Why is that less than 3,344?

A. Because that—*that subtracts off the people that would not get any because they would have received less than $50.*

J.A. 409-10 (emphasis added).

Plaintiffs' Exhibit 345, referred to by counsel questioning Dr. Fox, summarized for the jury Dr. Fox's estimate of damages due to the Rule 23 class ($6,686,082.36) and for the collective action ($1,611,702.44) for uncompensated work time. Plaintiffs' Ex. 345, filed Sept. 9, 2011, J.A. 139. The exhibit states, as Dr. Fox testified, "Damages were eliminated for individuals whose damages amount was less than $50." *Id.*

Shortly thereafter in her direct examination, Dr. Fox again made clear that all class members who she calculated as having been undercompensated by $50 or less, including 212 who were owed no overtime at all, were identified and excluded from her calculation of the unpaid overtime due to the class.

> Q. I want to pull up Defendant's 2272 which is her Deposition Exhibit 54.
>
> Q. So this is your original list that I resorted before you took out people under $50, correct?
>
> A. That was—that was after—this is after my report, but before I removed $50?
>
> Q. That's correct.
>
> A. Okay.
>
> * * *
>
> Q. Let's go down your original list before Mr. Wiggins [1302] told you to cut out the people under $50 and I think we can clarify that my question about how many

> people would have gotten zero even before Mr. Wiggins told you to cut them out, let's go down to the first person who gets anything. . . Do you see at line 213 we see Akur Guang?
>
> A. Yes.
>
> Q. That means the first row is—numbered row is the header, correct?
>
> A. That's correct.
>
> Q. That means the first 212 people on your list -
>
> A. Yes.
>
> Q. they would have gotten zero even assuming all of Dr. Mericle's numbers and everything else the Plaintiffs say, right? Correct?
>
> A. That's correct. It would not have been enough to kick them into overtime.

J.A. 414-15.

Petitioner is not correct in arguing that "Plaintiffs have [not] proposed any way that the judgment can be limited only to injured class members. In fact, there is no way to know which class members the jury found were injured." Br. of Petitioner 53. To the contrary, Dr. Fox testified she was able to identify by name all the 212 employees who were not deprived of overtime pay. In addition, the jury heard Dr. Fox testify that the $6,686,082.36 they were asked to award to the class represented the

total of the individual claims of those class members who were underpaid by $50 or more. The jury also received Plaintiff's Exhibit 345, which contained the same information.

Class members who were owed no overtime added nothing to the amount asked of the jury. Nor would any "culling" mechanism have altered the amount of Tyson's liability.

B. Petitioner lacks standing to challenge the allocation of aggregate damages among class members.

Petitioner further speculates that "each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." Br. of Petitioner 53. There is no basis for such an assertion. As Petitioner acknowledges, the district court may entertain a motion by plaintiffs to allocate the aggregate verdict. *Id.* But Petitioner asserts that any such attempt "would raise a host of due process concerns and violate the Seventh Amendment's command . . ." *Id.* at 53.

Not at all. Every member of the class had standing, and the aggregate verdict for the whole class, which Petitioner requested, represented the total of those members of the class who were uncompensated for $50 of overtime or more. Regardless of how the class, or the district court on motion of the class, may allocate the verdict among the members of the class, Tyson's liability for the judgment will not change. To the extent that Tyson had the right to contest the amount owed to any individual class member, Tyson waived that right by

seeking a jury determination of only the aggregate amount of unpaid overtime owed to the class.

How the jury's award in this case shall be divided among the class members remains to be determined. It is certain, however, that the allocation cannot affect the amount of Tyson's liability. Tyson therefore has no standing to contest class certification on that ground. *See In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014) (Defendant "has no interest in the method of distributing the aggregate damages award among the class members."); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003) ("[A] defendant has no interest in how the class members apportion and distribute a[n] [aggregate] damage [award] among themselves."); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members.").

Because the record shows there was no chance that the jury's award included the claims of uninjured class members, and because the allocation of the award among the class members will have no effect on Tyson's liability to the class, Tyson lacks standing to challenge the certification of the class as including workers with no overtime claims.

Because those arguments formed the basis for Tyson's Petition, AAJ suggests that the writ be dismissed as improvidently granted as to the second question.

III. The Court Below Properly Held That Where a Purported Class Satisfies the Requirements of Rule 23(a), No Further Proof of Standing on the Part of Absent Class Members Is Required.

A. Federal courts agree that plaintiffs need not prove that absent class members have Article III standing as a separate requirement for class certification.

If this Court addresses the second question presented, AAJ urges the Court to affirm.

The decision below conforms to the prevailing rule that "only the named plaintiff must demonstrate standing to assert the claims (including injury in fact), not the absent class members. Individual class members do not need to submit evidence of personal standing." 1 *McLaughlin on Class Actions* § 4:28 (11th ed. 2014). This is not to say that class actions are exempt from the strictures of Article III. Rather, federal courts ensure justiciability by close inquiry into the prerequisites for a class action set out in Rule 23(a), particularly the identification of common issues of law or fact, the typicality of the named plaintiffs' claims to the class's claims, and the adequacy of representation by the named plaintiffs. Fed. R. Civ. P. 23(a)(2)-(4). *See also* 7AA Charles A. Wright *et al.*, *Fed. Prac. & Proc. Civ.* § 1785.1 (3d ed. 2014) ("[T]he question whether [a class representative] may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation.").

At the outset, AAJ notes that, contrary to Petitioner's contention, the circuit courts are not in disagreement on this point. *See* Pet. 26. The Third Circuit recently held that "unnamed, putative class members need not establish Article III standing. Instead, the 'cases or controversies' requirement is satisfied so long as a class representative has standing." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015). As Petitioner has noted, the Seventh, First, and Tenth Circuits are in agreement. *See* Pet. 26-27 (citing *Kohen*, 571 F.3d 672; *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015); and *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010)). *See also Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) ("Class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct" (citing *Kohen*)); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("[F]ederal courts do not require that each member of a class submit evidence of personal standing."); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements.").

It is important to note that these courts do not ignore "the irreducible constitutional minimum of standing" under the case-or-controversy requirement of Article III. *Lujan*, 504 U.S. at 560. *See, e.g., Kohen*, 571 F.3d at 676 ("It is true that injury is a prerequisite to standing."); *Nexium*, 777 F.3d at 31-32 (same). However, federal courts comply with this requirement by ensuring that the purported class conforms to the prerequisites of Federal Rule of Civil Procedure 23. *See Kohen*, 571 F.3d at 677-79 (predominance of common issues and adequacy of representation);

Nexium, 777 F.3d at 25, 30-31 (commonality and predominance); *Stricklin*, 594 F.3d at 1196-97 (commonality); *Avritt*, 615 F.3d at 1034 (class definition); *Stearns*, 655 F.3d at 1020-21 (predominance).

This approach conforms to this Court's instruction that "class certification issues are dispositive" and are "logically antecedent to the existence of any Article III issues." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830-31 (1999). Moreover, if the district court concludes that the class meets the Rule 23 prerequisites, the certified class acquires a separate legal status, making additional proof of standing of each absent member unnecessary. *See Sosna v. Iowa*, 419 U.S. 393, 399 (1975). As the Third Circuit correctly stated, "a properly formulated Rule 23 class should not raise standing issues." *Neale*, 794 F.3d at 368.

The cases cited by Petitioner show no disagreement among the circuits on this issue. *See* Pet. 28-29. In *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), Petitioner's chief exhibit in showing a split in the circuits, the Second Circuit affirmed the district court's class certification in a lawsuit against professional tax advisors for fraudulent tax counseling, rejecting the objection that some class members had not been assessed tax penalties and therefore lacked Article III standing. *Id.* at 259. The court explained: "We do not require that each member of a class submit evidence of personal standing. Once it is ascertained that there is a named plaintiff with the requisite standing there is no requirement that the members of the class also

proffer such evidence."). *Id.* at 263-64 (internal quotations omitted).

The Ninth Circuit in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), *cited in* Pet. 28, held that that plaintiffs' allegations that "class members were relieved of their money" by Honda constituted injury-in-fact without individualized proof for each member of the class. *Id.* at 595 (citing *Stearns*, 655 F.3d at 1021).

The District of Columbia Circuit in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), did not address Article III standing of absent class members at all. Rather, the court found that the statistical model proffered by freight customers alleging that defendant railroads engaged in a price-fixing conspiracy did not provide reliable class-wide proof of damages as required by this Court in *Comcast*, 133 S. Ct. at 1432. 725 F.3d at 252-53.

In short, all federal circuits that have addressed the issue have held that where a class representative has standing and has alleged harm to the class, plaintiffs need not also prove that every member of the class was in fact injured. Petitioner assigns error to the failure of the court of appeals to order decertification of the class after trial evidence indicated that members of the class have no compensable claim. But Petitioner has offered no case in which a class has been decertified on that basis.

B. The decision below comports with this Court's precedents regarding representative actions.

Tyson's argument is largely premised on the proposition that a class action is no more than a collection of individual cases tried at once. *See* Br. of Petitioner 46. For standing purposes, however, "the key" is that "a class action is a *representative* action brought by a named plaintiff or plaintiffs." *Neale*, 794 F.3d at 364. This Court in a variety of contexts has placed the focus on the Article III standing of the named plaintiff in representative actions.

In a class action, for example, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendant[ ], none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The named class plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). Justice Souter suggested that "there is no apparent question that the standing of at least one of the class-action plaintiffs suffices for our jurisdiction." *Lewis v. Casey*, 518 U.S. 343, 394 (1996) (Souter, J., concurring in part, dissenting in part). Instead, whether "the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." *Id.* at 395-96.

In cases involving multiple plaintiffs, this Court has held that "in all standing inquiries, the critical question is whether at least one petitioner has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Horne v. Flores*, 557 U.S. 433, 445 (2009). Thus, where "we have at least one individual plaintiff who has demonstrated standing . . . we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977). In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), this Court expressed agreement with the lower court's view that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Id.* at 52-53 n.2. Likewise, in *Bowsher v. Synar*, 478 U.S. 714 (1986), an action challenging federal spending cuts, the fact that a named union member "will sustain injury by not receiving a scheduled increase in benefits," was sufficient to confer standing under Article III. *Id.* at 721 "We therefore need not consider the standing issue as to the Union or Members of Congress." *Id.*

In the situation were the claim of a class representative has become moot this Court has recognized that the question is not whether suit can proceed on the standing of some unnamed members of the class, but whether "the named representative [can continue] to "fairly and adequately protect the interests of the class." *Sosna*, 419 U.S. at 403 (quoting Fed. Rule Civ. P. 23(a)). *See also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404-06 (1980) (same).

Clearly the position taken by the Eighth Circuit and by every circuit court to address the issue

comports with this Court's view in representative actions that a case is justiciable when at least named one named plaintiff has Article III standing.

C. Careful application of the Rule 23 prerequisites for class certification is a fairer and more pragmatic guarantee of justiciability than requiring proof of injury of each absent class member.

Petitioner proposes that class certification be granted only when, in addition to complying with Rule 23, plaintiffs also prove that each absent member of the class suffered injury-in-fact. Br. of Petitioner 44. Petitioner offers no practical means of implementing such a requirement; it merely insists that plaintiff should bear the burden of proving at every stage of the litigation that the class contains no members who will be shown at trial to be uninjured or provide a mechanism to "cull" those class members. *Id.* at 50.

As Judge Posner has pointed out, when plaintiffs seek certification, "many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown." *Kohen*, 571 F.3d at 677. In addition, as the Fifth Circuit stated, "we are aware of [no authority] that would permit an evidentiary inquiry into the Article III standing of absent class members during class certification and settlement approval under Rule 23." *In re Deepwater Horizon*, 739 F.3d at 805-06. The court also observed that in scrutinizing plaintiffs' proof of the merits of the absent members' claims on motion to certify, "it would be premature and improper for a court to apply evidentiary standards

corresponding to those later stages of litigation." *Id.* at 807.

Indeed, requiring class plaintiffs to prove their case on the merits at the outset of the litigation is "putting the cart before the horse in [a] way [that] would vitiate the economies of class action procedure" *Kohen*, 571 F.3d at 676. The purpose of class actions, this Court has observed, is to save "the resources of both the courts and the parties by permitting an issue *potentially* affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (emphasis added). Placing the added burden on litigants to establish that the defendant's alleged misconduct actually injured each individual absent class member prior to discovery "would make no practical sense," *In re Deepwater Horizon*, 739 F.3d at 807, and "is inconsistent with the nature of an action under Rule 23." *Neale*, 794 F.3d at 367.

Indeed, it is difficult to discern what legitimate benefits might flow from Petitioner's proposal. If plaintiffs succeed in presenting sufficient evidence to prove injury to all class members due to defendant's alleged misconduct, there remains little incentive to settle for less than plaintiffs' full demand. *In re Deepwater Horizon*, 739 F.3d at 807. Petitioner's proposal accomplishes little more than adding to the transaction costs that plaintiffs' counsel must seek to recoup in any settlement. The obvious result will be fewer and more costly settlements. *See In re Deepwater Horizon*, 739 F.3d at 807 (noting the "overriding public interest in favor of settlement" of class action suits).

If, on the other hand, the court denies certification because plaintiffs cannot prove that the evidence at trial will show that all class members suffered compensable injury, the "economies of class action procedure" are lost entirely. Petitioner's proposal could result in numerous individual, nearly identical actions in which the defendant can litigate its defenses to individual claims. *See* Br. of Petitioner 47. But the far more likely result is that few if any of those who have been denied their federal statutory right to compensation for work will bring such an action. The avoidance of accountability by increasing the cost of obtaining justice is not a legitimate benefit. After all, the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc.*, 521 U.S. at 617 (internal quotation omitted).

Moreover, federal courts already rely on the prerequisites set out in Rule 23(a) to ensure that class actions present justiciable cases or controversies. At the same time, careful application of the rule provides practical application and flexibility to "achieve economies of time, effort, and expense, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* at 615 (quoting Fed. R. Civ. P. 23, 1966 Advisory Comm. Note).

An important tool in this regard is the district court's authority to tailor the class definition to ensure that common issues of law or fact predominate and class representatives adequately represent the class. Thus, "if it is apparent that [the class] contains a great many persons who have suffered no injury at the hands of the defendant . this would be a compelling

reason to require that [the class definition] be narrowed," rather than deny certification. *Kohen*, 571 F.3d at 677-78. In this case, for example, the district court limited the class of hourly workers to include only those who were paid under the gang-time system, excluding those who could not have been undercompensated even if the Complaint's allegations proved true. *Bouaphakeo*, 564 F. Supp. 2d at 905.

In some circumstances, as in the present case, the court may determine that common issue favor asking the factfinder to award a single recovery to a class as a whole and then allocate that recovery in some practical way. *See, e.g., Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-54 (7th Cir. 1976).

If, as the litigation unfolds, differences among class members suggest that some claims might not be compensable, "the district judge might decide to create subclasses." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

In still other situations, the court may ascertain that only liability issues predominate, leaving damages for later individualized determinations. *E.g., In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008); *Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir. 2004); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139, 141 (2d Cir. 2001). In some such cases, Judge Posner points out, if the parties could "agree on a schedule of damages . . . the hearings would be brief; indeed the case would probably be quickly settled." *Butler*, 727 F.3d at 798.

Finally, Rule 23 gives district courts the power to revisit and revise its decision in light of new developments or evidence. Under Rule 23(c)(1)(C), "[a]n order that grants or denies class certification may be altered or amended before final judgment." Accordingly, "[a] district court may decertify a class if it appears that the requirements of Rule 23 are not in fact met." *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir. 1982). This authority is particularly important because, ordinarily, "the decision on class certification comes before full merits discovery has been completed" and the certification decision "may therefore require revisiting upon completion of full discovery." *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005).

All the tools needed to ensure a federal class action presents a live Article III case or controversy are already in the hands of the district courts. As Judge Posner states, Rule 23 establishes "the efficient procedure for litigation of a case" where the defendant "may have imposed costs on tens of thousands of consumers, yet not a cost to any one of them large enough to justify the expense of an individual suit." *Butler*, 727 F.3d at 798. AAJ urges this Court not to undermine the purposes of Rule 23 by setting an unprecedented, extraneous, and unwarranted barrier to access to federal courts for plaintiffs who have suffered violation of federally protected rights.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the decision of the lower courts.

Respectfully submitted,

Jeffrey R. White
Counsel of Record
CENTER FOR CONSTITUTIONAL
LITIGATION, P.C.
777 6th Street N.W.
Suite 520
Washington, DC 20001
(202) 944-2839
jeffrey.white@cclfirm.com

Attorney for Amicus Curiae

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